Due service of the within brief is hereby acknowledged this.....day of February, A. D. 1933.

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Attorneys for Petitioner.

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IN THE

Supreme Court of the United States

No. 541.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

A. T. JERGINS TRUST, *Respondent.*

On Writ of Certiorari to the Circuit Court of Appeals for the Ninth Circuit.

BRIEF OF AMICUS CURIAE.
PUBLIC OWNERSHIP LEAGUE OF AMERICA.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

We hereby consent to the filing of the foregoing brief *amicus curiae* and acknowledge service of a copy thereof this.....day of February, A. D. 1933.

.....
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Attorney for Respondent.

AUTHORITIES.

Ambrosini v. U. S., 187 U. S. 1 (1902) 7
Brinkmeyer v. City of Evansville, 29 Ind. 198 (1867) 7
Burnet v. Coronado Oil & Gas Co., 285 U. S. 393..... 2
Canavan v. City of Mechanicsville, 229 N. Y. 473; 128 N. E. 882 6
City of Trenton v. State of New Jersey, 262 U. S. 182 5
Edgerly v. Concord, 59 N. H. 78 6
Flint v. Stone Tracy Co., 220 U. S. 107, 172 (1911).... 4
Gillespie v. Oklahoma, 257 U. S. 501 2
Harris v. District of Columbia, 256 U. S. 650 (1921).. 7
Hodgins v. Bay City, 156 Mich. 687 6
Judson v. Winsted, 80 Conn. 364; 68 Atl. 999..... 7
Keever v. City of Mankato, 113 Minn. 55; 129 N. W. 158 6
Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685 4
Marin Water Co. v. Sausalito, 49 Cal. App. 78 5
Mayor of Savannah v. Jordan, 142 Ga. 409; 83 S. E. 109 (1914) 7
Murphy v. City of Indianapolis, 158 Ind. 238; 63 N. E. 469 (1902) 7
Musano v. Mayor of New York, 160 N. Y. 123; 54 N. E. 744 (1899) 7
New Orleans v. Morris, 105 U. S. 600 4
Smith's Admr. v. City of Louisville, 146 Ky. 562; 43 S. W. 3 (1912) 7
Springfield Fire & Marine Insurance Co. v. Keeseville, 148 N. Y. 46, 57; 42 N. E. 405..... 6
Stubbs v. Rochester, 226 N. Y. 516; 124 N. E. 137..... 6
Wheeler v. City of Cincinnati, 19 Oh. St. 19 (1869).... 7
Winona v. Botzet, 169 Fed. 321 7
Wright v. Augusta, 78 Ga. 241 6

MISCELLANEOUS.

Farnham on Water & Water Rights, Sec. 155a 4

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BRIEF OF PUBLIC OWNERSHIP LEAGUE OF AMERICA, AMICUS CURIAE.

The Public Ownership League of America represents an association of several thousand municipalities in the various states of the Union, which undertake to furnish a pure and adequate supply of water to their inhabitants through a waterworks system owned and operated by the municipality.

They are vitally interested in the definition and scope that this Honorable Court may give to a phrase so plastic

as "essential governmental function" in defining the outer extent of the Federal taxing power where that power infringes upon municipal activity.

However opinion may have been divided in forging their conclusions, *Gillespie v. Oklahoma*, 257 U. S. 501, and its counterpart, *Burnet v. Coronado Oil & Gas Company*, 285 U. S. 393, so far as *stare decisis* can establish a rule of conduct, establish that the income derived by a lessee from lands, acquired and used in the exercise of an essential governmental function by one sovereign cannot be burdened through taxation by the other sovereign.

Whatever may be felt as to the wisdom or the impregnability of that conclusion, the fact that opinion may be divided must not permit an easy escape by unduly limiting the field of "essential governmental functions." The suggestion that the rule of *Gillespie v. Oklahoma* will be strictly applied (Coronado Case, 285 U. S. 393) should carry the implication that the objects of the bounty will be limited and not that the Court will narrow its field of vision of "governmental functions." Efforts may be expected to escape the consequences of the decision by circumscribing the ambit. It is respectfully submitted that the ambit should be large and easy but those admitted to it may well be required to furnish indubitable proof of identification with the field. If the connection be deemed slight or the identification meagre, there may be reason for exclusion but not for narrowing the field.

It is in the light of these principles that this brief is submitted. Whether the function of gathering and distributing a pure and adequate supply of water for its inhabitants is an "essential governmental functions" is the sharp question before the Court.

The brief of the petitioner suggests that it is a "public" or "municipal" purpose but not a strictly governmental function. (P. 15). The basis for distinction between these labels is not indicated. Precedents avail little when politi-

cal philosophies differ. The switch from "essential governmental" to "strictly governmental" is another effort to draw in the lines of the field, regardless of who are admitted. If this means that supplying water is something in which the municipalities are interested but in which they need not engage, the municipalities respectfully differ with the United States attorneys.

Almost every municipality which is now engaged in supplying water is so engaged because of necessity and not convenience. The necessity may be born, as it was in this case, of the interference of private distribution with municipal functions of maintaining streets in sanitary condition; it may be born of anxiety concerning health, in which the system is found inadequate to avoid contamination but cannot be replaced by private capital; it may be born of impossibility of expanding the source of supply to meet the needs of the community because of a prohibitive rate base. The Spring Valley Water Company of San Francisco could not go to Hetch Hetchy, the Los Angeles Water Company could not go to the Owens River or the Colorado, and the East Bay Water Company could not go to the Mokelumne. In each case the municipality, of necessity, stepped in to make the necessary extension. Those are cases of necessity,—not of choice.

A survey indicates that in a total of all the incorporated municipalities within the United States, more than 95 per cent of them own and operate a water plant. It is therefore submitted that the owning and operating of water plants is quite a usual function of States and State Agencies.

The building of Hoover Dam by the Federal Government marks the entry of the United States into the problem of water supply and power. The pressure of population makes that a necessity which theretofore was but a dispensable luxury. A water supply problem in California makes the question there acute before the areas of abundant supply

have even vaguely felt its presence. The recognition of the necessity and governmental action based on it is the birth of an essential governmental function when to remain passive would invite social disaster.

What are the precedents? In a profound sense there are none. Ultimately the decision as to what is a governmental function will depend on individual opinion as to what is the appropriate function of government.

We begin with the dictum in *Flint v. Stone Tracy Co.*, 220 U. S. 107, 172 (1911). The quotations in the petitioner's brief (p. 16) are inadequate to show their basis. Water supply was not involved in any sense nor was artificial light. A railroad sought to escape the excise tax by insisting that its franchise made it a state agency. This, the court denied with this statement (p. 172):

> "If a State may not thus withdraw from the operation of a Federal taxing law a subject-matter of such taxation, it is difficult to see how the incorporation of companies whose service, though of a public nature, is nevertheless, *with a view to private profit*, can have the effect of denying the Federal right to reach such properties and activities for the purposes of revenue." (Italics ours)

The emphasis is on the element of profit. Ninety-five per cent of the publicly owned water systems of the country are not operated at or for a profit.

This case may be compared to decisions in which water supply was in question. In *Long Island Water Supply Co. v. Brooklyn*, 166 U. S., 685, this Court held that water supply is a public necessity and therefore may be secured by condemnation proceedings. See also *Farnham, On Water and Water Rights*, Sec. 155a.

In *New Orleans v. Morris*, 105 U. S. 600, this Court specifically held that waterworks could not have been seized on execution at any time since they were held by the city in its governmental capacity and therefore an obligation

of contract was not impaired by a state statute declaring that bonds received by the city for transfer of its waterworks could not be seized in payment of a debt.

Likewise the California courts have held that a waterworks system cannot be seized on execution. *Marin Water Co. v. Sausalito,* 49 Cal. App. 78.

Nor does the decision in *City of Trenton v. State of New Jersey,* 262 U. S. 182, indicate that water supply was a private function, for this Court denied that the city could set up the Fourteenth Amendment or the Impairment of Contract clause against a state law exacting a license fee for diverting water from a stream whereas the predecessor private owner had by legislative enactment the right to divert water from that stream. This Court (p. 191) felt the difficulty of stating any rule:

> "The basis of this distinction (between private and governmental functions) is difficult to state, and there is no established rule for the determination of what belongs to the one or the other class."

Whether, fundamentally, other principles may explain these decisions, it is evident that there is no fixed concept of governmental or proprietary functions or that any line of any sort can be defined so long as government serves the needs of man and so long as the pressure of population accentuates the demand for social control of the instruments to satisfy those needs.

The tort cases relied upon extensively by the government are will-o'-the-wisps. The tort law is in a chaotic state, representing great diversity of local opinion on the problem of distributing the individual injury over the local community.

The law is in flux and change and presents attempts to reconcile doctrines based on the immunity of the sovereign from suit with the social demand that the burden of injury be shifted to the group responsible for it. It was very

easy in cases not historically, in this country, connected with municipal endeavor but associated with concepts of profit to find occasion for shifting the burden.

An electricity case shows the absurdity of the tort distinctions. A was killed by an alternating current. The city supplied direct current for street lighting; alternating current to consumers. The State Court held the city liable for the death of A and intimated strongly it would not have been held if A had been killed by the direct current. *Hodgins v. Bay City,* 156 Mich. 687.

That the supply of water is not always regarded as a proprietary enterprise is shown by those cases which deny liability where the failure of water through lack of due care, resulted in fire loss. The courts find the duty to the public and not to the individual though he may have paid rates to get this very supply. *Wright v. Augusta,* 78 Ga. 241; *Edgerly v. Concord,* 59 N. H. 78; *Springfield Fire & Marine Insurance Co. v. Keeseville,* 148 N. Y. 46, 57; 42 N. E. 405. In the latter case the court asserted that the establishment and operation of waterworks was a governmental function. If this were as the petitioner contends but a proprietary enterprise, the municipality should be fully liable to a consumer who has paid for the service.

Likewise for furnishing contaminated or impure water it would seem the city can be held liable only on evidence of *gross* negligence in permitting the contamination to occur.

> *Stubbs v. Rochester,* 226 N. Y. 516; 124 N. E. 137.
> *Keever v. City of Mankato,* 113 Minn. 55; 129 N. W. 158.

Nor is there an implied warranty of purity. *Canavan v. City of Mechanicsville,* 229 N. Y. 473; 128 N. E. 882. Yet if water supply were a proprietary operation, it is strange that lack of ordinary care in rendering service does not result in liability and there is no reason why the city

should not be held to the same liability as a private dispenser of liquids.

When waterworks or appurtenances are used for dual purposes of fire protection and other purposes such as flushing streets, valiant efforts are made to distinguish the particular function or use in connection with which the injury occurred and to determine the liability accordingly.

See *Winona v. Botzet*, 169 Fed. 321, injuries caused by a horse frightened by the whistle of a waterworks, and *Judson v. Winsted*, 80 Conn. 364; 68 Atl. 999, injuries caused by a horse frightened by the flushing of a hydrant.

Fire-fighting is a recognized governmental activity, *Brinkmeyer v. City of Evansville*, 29 Ind. 187, (1867); *Wheeler v. City of Cincinnati*, 19 Oh. St. 19 (1869); the preservation of public health is likewise a governmental concern. *Ambrosini v. U. S.*, 187 U. S. 1 (1902); *Harris v. District of Columbia*, 256 U. S. 650 (1921); cleaning streets is a matter of governmental concern. *Harris v. District of Columbia*, (*supra*); *Mayor of Savannah v. Jordan*, 142 Ga. 409; 83 S. E. 109 (1914); contra, *Musano v. Mayor of New York*, 160 N. Y. 123; 54 N. E. 744 (1899); sewers are a governmental concern, *Smiths' Admr. v. City of Louisville*, 146 Ky. 562; 43 S. W. 3 (1912); contra, *Murphy v. City of Indianapolis*, 158 Ind. 238; 63 N. E. 469 (1902)—yet these functions are closely related, at times, inseparable from the function of supplying water. There are no bright lines in municipal administration and tort concepts furnish no clue to solution of questions of taxation. If the tort precedents are followed, they will lead to a hopeless morass, the solution of which will come only through legislative imposition of liability.

Water is furnished generally for compensation, not necessarily for profit, and gives rise to a fertile field for holding a municipality liable in tort. The element of compensation, though not directly apparent, affords the common operative fact to induce a judge to take these services out of the sphere of governmental enterprises.

If the courts fully appreciated and gave practical effect to the fact that taxpayers pay for all municipal enterprises and that they must all be legally justified as accruing for their benefit, we might find a greater disposition to drop the uncertain and largely outworn distinction between governmental and corporate enterprises which have plagued the courts in a futile effort at uniform classification and have challenged the logic of the law and justice of its administration.

Where two governmental agencies occupy the same field, in which one demands freedom of action and the other demands revenue, is not any attempt to delimit the field of governmental or proprietary activity an illusion? The power of the Federal Government is dependent on its power to command the individual. Are we not shifting money from one pocket to another pocket when a municipal enterprise is burdened? The question of fact whether it is so burdened may occasion split of opinion, but assuming the burden is present, it is duplication to take from a municipality by taxation what that municipality must exact in turn from the people. It is a transfer of the burden of the Federal Government to the municipalities of the land. It is not answered by pointing out that the municipalities need not have undertaken the particular function. History shows that this arose from necessity not from choice. The pressure of social necessity should be recognized in making constitutional distinctions. Otherwise this would lead to but one consequence—Federal dictation of local activity.

Respectfully submitted,

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